Supreme Court, U. S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1297 and 79-5954

In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID ALAN VICTORSON AND ERIC A. HALE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ROMAN FERRER RUBIES AND PEDRO VERA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Adams v. *Williams*, 407 U.S. 143	13
Cook v. *United States*, 288 U.S. 102	10
Delaware v. *Prouse*, 440 U.S. 648	12
Dunaway v. *New York*, 442 U.S. 200	13
Erwin v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980)	11
Rakas v. *Illinois*, 439 U.S. 128	11
Scott v. *United States*, 436 U.S. 128	14
Terry v. *Ohio*, 392 U.S. 1	13, 14
United States v. *Brignoni-Ponce*, 422 U.S. 873	12
United States v. *Cortes*, 588 F.2d 106	7, 8-9, 10, 12
United States v. *Petrulla*, 457 F. Supp. 1367	9
United States v. *Piner*, 608 F.2d 358	12
United States v. *Robinson*, 414 U.S. 218	14

Constitution, treaties, statutes, and rule:

United States Constitution, Fourth Amendment	3, 7, 10, 11, 12, 14

Constitution, treaties, statutes, and rule—Continued	Page
Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200:	
Article 6	9
Article 22	9
Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639:	
Article 14(1)	9
14 U.S.C. 89(a)	7, 8
21 U.S.C. 841(a)(1)	3
21 U.S.C. 952	3
21 U.S.C. 960(a)(1)	3
21 U.S.C. 963	3
Fed. R. Crim. P. 35	4
Miscellaneous:	
I. Oppenheim, *International Law* (7th ed. 1948)	10

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1297

DAVID ALAN VICTORSON AND ERIC A. HALE,
PETITIONERS

v.

UNITED STATES OF AMERICA

No. 79-5954

ROMAN FERRER RUBIES AND PEDRO VERA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 79-1297 (Pet. App. 1a-2a)[1] is not reported. The opinion of the court of appeals in No. 79-5954 (Pet. App. 3a-16a) is reported at 612 F.2d 397.

JURISDICTION

The judgment of the court of appeals in No. 79-1297 was entered on October 23, 1979. A petition for rehearing was denied on January 22, 1980 (Pet. App. 17a-18a), and the petition for a writ of certiorari was filed on February 21, 1980. The judgment of the court of appeals in No. 79-5954 was entered on September 10, 1979. A petition for rehearing was denied on November 23, 1979. Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 18, 1980, and the petition was filed on January 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the high seas boarding and search of petitioners' stateless vessel by Coast Guard officers to determine her identity, national registry and recent activities violated United States treaty law (No. 79-5954).

[1] "Pet. App." refers to the appendix to the petition in No. 79-1297.

2. Whether the boarding and search violated the Fourth Amendment because it was unsupported by probable cause and a search warrant.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, petitioners Rubies and Vera were convicted of importing marijuana into the United States, in violation of 21 U.S.C. 952 and 960(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 963. Petitioner Rubies was sentenced to concurrent terms of four years' imprisonment to be followed by a five-year special parole term. Petitioner Vera was sentenced to concurrent terms of two years' imprisonment to be followed by a five-year special parole term. The court of appeals affirmed (Pet. App. 3a-16a).

Following a jury-waived trial on stipulated facts before the same district court, petitioners Victorson and Hale were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963, and possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1). Petitioners Victorson and Hale were each sentenced to concurrent terms of five years' imprisonment on the conspiracy count and three years' imprisonment on the possession count, to be followed by a five-year special parole term, and they were each fined a total of

$30,000.[2] The court of appeals affirmed on the basis of the decision it previously had rendered in the case of petitioners Rubies and Vera (Pet. App. 1a-2a).

Prior to their respective trials, petitioners, who had been charged in a single indictment, moved to suppress evidence, including 37 tons of marijuana, seized by Coast Guard officers after stopping and boarding the freighter HELENA STAR on the high seas. The evidence pertaining to that motion is summarized in the opinion of the court of appeals (Pet. App. 3a-7a). It showed that during the evening of April 15, 1978, a lookout aboard the Coast Guard cutter YOCONA, which was patrolling the Washington coast, spotted what appeared to be a small airplane flying low to the water about 12 to 15 miles offshore. The commander of the YOCONA, Charles W. Morgan, suspected that the plane was looking for a ship, perhaps one engaged in smuggling.

At approximately noon the following day, a vessel, subsequently identified as the HELENA STAR, was

---

[2] We note that each petitioner received a special parole term as part of his sentence for the conspiracy to import marijuana. The propriety of imposing a special parole term for a narcotics conspiracy offense is presently before the Court in *Bifulco* v. *United States*, No. 79-5010 (argued Feb. 27, 1980). However, since petitioners each received identical concurrent special parole terms for the substantive counts on which they were convicted, there is no need for the Court to defer consideration of these petitions until *Bifulco* is decided. In any event, if the Court in *Bifulco* concludes that a special parole term may not be imposed for a conspiracy offense, petitioners may move the district court for correction of sentence under Fed. R. Crim. P. 35.

picked up on the YOCONA's radar screen. It was approximately 50 miles offshore and proceeding eastward toward the Strait of Juan de Fuca, located between northwestern Washington and Vancouver Island, British Columbia. The HELENA STAR did not display any flag. Commander Morgan raised her by radio and inquired as to her nationality and destination. A reply from the vessel informed Commander Morgan that the HELENA STAR was of British registry and was headed for Victoria, British Columbia.

Shortly after this radio contact, the YOCONA passed within a quarter mile of the stern of the HELENA STAR. Commander Morgan observed that both the name "HELENA STAR" and the purported home port of "Road Harbour" (a small port in the British Virgin Islands) were painted over the more permanently affixed name, "FRATERNITE." The crew of the YOCONA relayed the information regarding the sighting to Coast Guard headquarters in Seattle.

At about 6:30 that evening, the YOCONA again sighted the HELENA STAR, this time about 15 to 18 miles off the Washington coast and proceeding outbound in a westerly direction. The YOCONA took up a position approximately ten miles astern and began to follow her. As darkness fell the HELENA STAR proceeded without the aid of navigation lights.

The following morning, April 17, Coast Guard headquarters in Seattle notified Commander Morgan that the HELENA STAR was not registered in Great Britain and that the Canadian government did not

expect her arrival. Because of these facts and the unusual manner in which the vessel had been operated, Coast Guard authorities directed Commander Morgan to board the HELENA STAR to determine her nationality, identification and recent activities. At approximately noon that day, at a location approximately 150 miles off the coast of Washington, the HELENA STAR was hailed to a stop and boarded by a crew from the YOCONA.

Upon boarding, Lieutenant Commander Walter John, the officer in charge of the boarding party, asked to see the ship's papers. Petitioner Rubies, who had identified himself as captain, produced a British provisional registration certificate that had expired. Other papers indicated that the HELENA STAR may once have been known by the name "FRATERNITE"; many of these papers had been altered by inserting the name "HELENA STAR" after the name "FRATERNITE" had been crossed out. Petitioner Rubies stated that the vessel did not have a log or a cargo manifest.

Unsatisfied as to the true identity of the HELENA STAR, Commander John asked to see the main beam number, which is recognized by maritime nations as positive identification of a vessel. Petitioner Rubies first responded that the ship did not have a main beam number and then stated that his crew would be unwilling to open the securely fastened hatch covers leading to the main hold. Commander John directed his own crew to begin opening the hatch

covers, which Rubies had indicated were the only means of access to the main hold. A short time later, an easily opened alternative route was found.

Upon entering the hold, the Coast Guard officers discovered a large quantity of marijuana. Petitioners Rubies and Vera, together with other members of the vessel's crew, were arrested, and the vessel was seized. A subsequent investigation revealed that petitioners Victorson and Hale, while not on board the vessel at the time of the stop, were also involved in the smuggling scheme.[3]

Relying principally on *United States* v. *Cortes*, 588 F.2d 106 (5th Cir. 1979), the court of appeals upheld the denial of petitioners' motions to suppress. The court concluded that a stateless vessel like the HELENA STAR may be boarded by Coast Guard officers pursuant to 14 U.S.C. 89(a), at least for the limited purpose of determining the vessel's true identity and national registry (Pet. App. 8a-10a), and that Fourth Amendment standards were satisfied here because "there were reasonable grounds to justify boarding the vessel" (*id.* at 13a), and the boarding and search were conducted in an "entirely reasonable" manner (*id.* at 12a).

---

[3] The government stipulated below that petitioners Victorson and Hale have "actual standing" to complain that their Fourth Amendment rights were violated by the stop and boarding of the HELENA STAR. While that seems to us a dubious proposition, we will assume, for purposes of this response, that petitioners Victorson and Hale may seek suppression of the evidence seized as a result of the boarding at issue here.

ARGUMENT

1. Petitioners Rubies and Vera contend (79-5954 Pet. 7-11) that the boarding and seizure of the HELENA STAR by Coast Guard officers violated United States treaty law. This claim is without merit.

Under 14 U.S.C. 89(a), Coast Guard officers are authorized to board any vessel on the high seas that is "subject to the jurisdiction * * * of the United States" for purposes of making inquiries, conducting a document check, and examining, inspecting, and searching the vessel. As the court of appeals held (Pet. App. 11a), at the very least, a stateless vessel such as the HELENA STAR is "subject to the jurisdiction of the United States" within the meaning of Section 89(a) for the limited purpose of determining her identity and registration. If this were not the case, the crew of an American vessel could immunize the vessel from United States law merely by claiming that the vessel is stateless. Thus, where, as here, information received from a vessel is not verified by the claimed nation of registry, there is a genuine need to ascertain the vessel's true registry, and under Section 89(a) the Coast Guard may board such a vessel to determine whether she is in reality an American vessel.[4] See *United States* v. *Cortes*,

[4] We also note that stateless vessels should be subject to Coast Guard boardings under Section 89(a) for the simple reason that no vessel should be immune from all laws concerning such matters as navigation, safety, and criminal enforcement by not being registered with any country.

supra, 588 F.2d at 108-109; *United States* v. *Petrulla*, 457 F. Supp. 1367, 1371-1372 (M.D. Fla. 1978).

The court of appeals correctly concluded (Pet. App. 10a n.3) that the actions of the Coast Guard in boarding the HELENA STAR did not violate the provisions of two treaties to which the United States is a party.[5] Under these treaties, only foreign flag vessels are accorded the right to undisturbed navigation on the high seas; stateless vessels do not come within their protection. Thus, by its terms, Article 22 of the Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962), applies to the boarding and search of "foreign merchant ship[s]," and these ships are identified as vessels that have the "right to fly" the flag they show. Similarly, pursuant to Article 14(1) of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964), that treaty expressly applies to "ships of all States," not to stateless ships.

The only mention of statelessness in either treaty is in Article 6 of the Convention on the High Seas, which provides in part:

> 2. A ship which sails under the flags of two or more States, using them according to conven-

[5] Because it is clear that the boarding and inspection of the HELENA STAR were not in violation of any treaty obligation of the United States, we find it unnecessary to address the question whether a treaty violation would require suppression of evidence at a criminal trial.

> ience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Ships "without nationality" are afforded no protection in any provision of the treaty. See *United States* v. *Cortes*, *supra*, 588 F.2d at 109-110. Indeed, it is a basic principle of international law that "[i]n the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State." I. Oppenheim, *International Law* 546 (7th ed. 1948), quoted in *United States* v. *Cortes*, *supra*, 588 F.2d at 110.[6]

2. Petitioners argue (79-1297 Pet. 19-23; 79-5954 Pet. 12-15) that the actions of the Coast Guard officers in boarding and conducting a limited inspection of the HELENA STAR violated the Fourth Amendment because those actions were unsupported by probable cause and a search warrant. Petitioners also contend (79-1297 Pet. 12-19; 79-5954 Pet. 16-17) that the officers improperly sought to circumvent the probable cause and warrant requirements of the Fourth Amendment by using the pretext of investigating the vessel's identity and registration to

[6] *Cook* v. *United States*, 288 U.S. 102 (1933), which petitioners cite in their support (79-5954 Pet. 7, 9-10), involved the Coast Guard seizure of a British registered vessel in violation of a 1924 treaty with Great Britain. We fail to perceive its relevance to this case, which concerns the stop of a stateless vessel.

disguise their actual motivation, which allegedly was to uncover evidence of a drug smuggling scheme. The court of appeals correctly rejected these contentions.

In *Erwin* v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980), this Court recently declined to review a claim that the Fourth Amendment was violated by the warrantless and suspicionless boarding of an American vessel on the high seas by Coast Guard officers for the purpose of conducting a safety and documentation check. There is even less reason to grant review here, since, as a stateless vessel, the HELENA STAR enjoyed no right of undisturbed navigation on the high seas under international law (see pages 9-10, *supra*). Accordingly, petitioners could not have entertained a justifiable expectation that the vessel would not be boarded by the maritime authorities of one or more nations. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

Moreover, even if the Coast Guard's practice of conducting random, suspicionless boardings of vessels, as in *Erwin*, presents difficult questions under the Fourth Amendment, no such difficulties are present here, because the boarding in this case had a reasonable factual basis. The evidence showed that the crew of the HELENA STAR had sought to conceal the vessel's identity and recent activities by misrepresenting her registry and destination and by pursuing an erratic course and sailing at night without lights. These facts provided "articulable and reason-

able suspicion" that the vessel was being operated in such a manner as to avoid detection for violation of United States law. See *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975).[7]

Here, as in *United States* v. *Cortes*, *supra*, the initial boarding to determine the vessel's true identity and registry was reasonable under the Fourth Amendment. It was only after petitioner Rubies failed to provide the boarding officers with satisfactory registration documents that the officers conducted a limited inspection to locate the vessel's main beam number for further evidence of identification. During the search of the cargo hold for the main beam number, the marijuana was observed in open view, providing probable cause to seize the vessel and arrest her crew.

Petitioners' contention that the Coast Guard should have obtained a warrant before boarding the HELENA STAR is frivolous in light of the fact that probable cause to search or seize the vessel was absent until after the boarding took place. But the absence of probable cause does not mean that the Coast Guard officers were required to ignore the substantial information in their possession concerning the vessel's

[7] The court of appeals thus correctly distinguished its earlier decision in *United States* v. *Piner*, 608 F.2d 358 (9th Cir. 1979), on the ground that unlike *Piner*, this case does not involve a random safety search in the absence of suspicious circumstances (Pet. App. 19a-20a).

mysterious identity and suspicious movements. Instead, the officers correctly adopted the "intermediate response" of stopping the vessel to determine her identity and destination and to obtain additional information about the vessel's recent activities. See *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972).

Petitioners' reliance (79-1297 Pet. 19-20; 79-5954 Pet. 15) on *Dunaway* v. *New York*, 442 U.S. 200 (1979), is misplaced, because here there was no arrest or full blown search of the vessel, but rather a limited stop to determine the vessel's identity. The limited inspection of the cargo hold for the main beam number was reasonably related to that purpose. The length of the stop was due, not to the actions of the Coast Guard boarding party, but to petitioner Rubies' inability to provide proper documentation and his refusal to cooperate in the inspection of the main beam number.[8]

Finally, there is no merit to petitioners' contention that the boarding and inspection violated the

[8] Nor was the limited nature of the boarding altered by virtue of the fact that the boarding crew was armed. The HELENA STAR had a nine-man crew, including petitioners Rubies and Vera. The members of the six-man boarding party were armed with service revolvers (which remained holstered); in addition, two officers carried shotguns, which they did not point at anyone (H. Tr. 227; "H. Tr." refers to the transcript of the hearing on the motion to suppress). In conducting the boarding, these officers were entitled to protect themselves, and their actions were not unreasonable under the circumstances. See *Terry* v. *Ohio*, 392 U.S. 1, 23-24 (1968).

Fourth Amendment because it was a pretextual search for evidence of crime. In *Scott* v. *United States*, 436 U.S. 128, 137 (1978), this Court concluded that the existence of an alleged Fourth Amendment violation turns on "an objective assessment of [the] officer's actions in light of the facts and circumstances then known to him," without regard to the officer's underlying intent or motivation in taking those actions. See *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Viewed objectively, as we have shown, the actions of the Coast Guard officers in this case were reasonable under the Fourth Amendment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

APRIL 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 816212 287